Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL OCHOA, PETITIONER

V.

THE STATE OF ARIZONA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

BERTRAM POLIS
COUNSEL OF RECORD
338 NORTH GRANADA AVENUE
TUCSON, ARIZONA 85701
(520) 884-9911

22pp

QUESTIONS PRESENTED

1. Whether a knowing and intelligent waiver of *Miranda* rights can exist when the defendant tells police that he does not want his conversation to be tape recorded because he does not want what he says to be used against him.

2. Whether the Petitioner's statement, "I don't want what I say to be used against me," after *Miranda* advice was given, constituted an invocation of the Petitioner's fifth amendment privilege against self-incrimination inadmissible as evidence at trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Samuel Ochoa, respectfully prays that a writ of certiorari issue to review the judgment and order of the Arizona Court of Appeals, Division Two, entered on November 15, 2110.

OPINIONS BELOW

The memorandum decision of the Arizona Court of Appeals, Division Two (Pet. App.[1] 1), is not reported. The Arizona Supreme Court's denial of Petitioner's application for discretionary review (Pet. App. 12) dated March 19, 2002, is not reported. The

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[1] Petitioner's Appendix to Petition for Writ of Certiorari.

trial court's decision (Pet. App. 13) is also not reported.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C.A. §1257 to review by writ of certiorari a final judgment rendered by the highest court of a state in which a decision could be had where any right under the Constitution of the United States is claimed.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner Samuel Ochoa was convicted of attempted first degree murder, aggravated assault with a deadly weapon, aggravated assault causing serious physical injury, endangerment, and drive-by shooting after a five-day jury trial in Pima County, Arizona. The charges arose from the October 17, 1998 shooting of Stephen Espinoza as he was driving his vehicle on Old Nogales Highway in Tucson. Mr. Espinoza identified Petitioner Ochoa as a person who shot at his vehicle from another vehicle as it was passing Espinoza's vehicle.

At trial, Petitioner Ochoa presented evidence regarding an on-going dispute between himself and the victim and introduced evidence that Mr. Espinoza had gang ties. Petitioner also presented alibi evidence demonstrating that at the time of the shooting, which took place between 2:00 and 2:30 a.m., Petitioner was injured and at home with his family after having accidentally shot himself in the foot at a party.

After Petitioner was arrested for the shooting, Tucson Police Department Detective Briamonte went to the South Tucson Police Department, where Petitioner Ochoa was being held in custody (Pet. App. 19-20). Detective Briamonte advised Petitioner of his

Miranda rights (Pet. App. 21). When Petitioner was asked whether he understood his rights, he allegedly responded "yes". *Id.* Petitioner was then asked if he would answer Detective Briamonte's questions, to which he allegedly responded in the affirmative again (Pet. App. 22). None of this conversation was tape-recorded, despite the fact that Detective Briamonte took out a tape recorder and placed it on top of the desk in the interview room while he was advising Petitioner of his rights. *Id.*

Petitioner pointed to the tape recorder and asked Detective Briamonte if it was on. *Id.* Detective Briamonte told Petitioner that it was not on (Pet. App. 23). Petitioner then said, "I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 24-25). Detective Briamonte told Petitioner that the recorder was not on and that it was simply a tool to document his side of the story (Pet. App. 25). Petitioner Ochoa asked if he was being arrested and was told that he was already under arrest for shooting Mr. Espinoza. *Id.* Detective Briamonte told Petitioner that he knew that Petitioner shot Mr. Espinoza and that he knew what happened (Pet. App. 37). Petitioner agreed to talk to the detective, but not on tape (Pet. App. 25). Detective Briamonte never provided any additional clarification regarding the use of Petitioner's statement against him and did not tell Petitioner that even though the conversation would not be tape-recorded, it could still be used against him any way (Pet. App. 33).

At trial, Detective Briamonte testified that Petitioner Ochoa's "first quote ... after his response to *Miranda* was I won't --I won't talk with that on. I don't want what I say to be used against me" (Pet. App. 45). Reference to this statement was also made during the prosecutor's opening statement at trial when the jury was told that, after *Miranda* warnings were provided to him, Petitioner Ochoa agreed to talk to Detective Briamonte, but that he would only do it if it was off-tape (Pet. App. 41).

Petitioner then told Detective Briamonte that he had confronted Espinoza at a local taco stand and asked Espinoza if Espinoza had a problem with Petitioner's brother (Pet. App. 26). Petitioner told Briamonte that Espinoza said there was no problem, but after Espinoza walked away, he was attacked by several other people, who Petitioner believed were friends of Espinoza (Pet. App. 26-27). Petitioner said that somebody shot him in the foot during the attack. *Id.* Petitioner also told Briamonte that he did not shoot Espinoza and that he did not know who did (Pet. App. 28).

Prior to trial, Petitioner made a motion to suppress the statements made to Detective Briamonte alleging that admission of the statements would violate his fifth, sixth, and fourteenth amendment rights under the U.S. Constitution (Pet. App. 13). The motion was denied by the trial court (Pet App. 17) and the statement was introduced at trial. Although Petitioner never admitted to shooting the victim,

admission his statement at trial was not innocuous because it showed that Petitioner lied to the police about how he was shot in the foot.

SUMMARY OF ARGUMENT

It is respectfully submitted that certiorari should be granted in this mater because important federal constitutional issues of law have been incorrectly decided in a manner which conflicts with relevant decisions of this Court. As demonstrated by his statement regarding the use of the tape recorder, Petitioner Ochoa clearly did not fully understand the nature of his Constitutional rights with respect to interrogation. The Arizona Court of Appeals has improperly presumed a level of comprehension upon Petitioner which is certainly not conveyed by Petitioner's statement, and which is not consistent with the State's "heavy burden" of proving a waiver and the Court's obligation to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). Furthermore, Petitioner's statement "I don't want what I say to be used against me" is clearly a valid invocation of Petitioner's constitutional privilege against self-incrimination and should not have been introduced as evidence against Petitioner.

ARGUMENT

I. Petitioner's statements should have been suppressed where the evidence clearly demonstrated that Petitioner did not understand his *Miranda* rights and thus could not have executed a valid waiver.

Detective Briamonte testified that after Petitioner was advised of his *Miranda* warnings, Petitioner pointed to a tape recorder and said, "I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 45). Detective Briamonte told Petitioner that the tape recorder would only be used to document his side of the story and did not clarify for Petitioner that what he said, even if it was not tape-recorded, would still be used against him (Pet. App. 33).

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966), this Court held that before the government may introduce evidence of a defendant's statements at trial, it must show that the defendant was warned of his right to remain silent, that anything he says can be used against him in court, and that he has the right to the presence of an attorney and to have an attorney appointed before questioning if he cannot afford one. *Id.,* 384 U.S. at 473, 86 S.Ct. at 1627. If the interrogation continues and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, 384 U.S. at 475,

86 S.Ct. at 1628.

In order to satisfy its burden, the prosecution must introduce sufficient evidence to establish that the defendant was aware of the "nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1141 (1986). The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

In this case, the government's "heavy burden" simply was not sustained as the evidence clearly demonstrated that Petitioner did not understand his fifth amendment rights. Petitioner's statement to Detective Briamonte about the tape recorder and his not wanting what he said to be used against him clearly indicates Petitioner's intention to exercise his privilege against self-incrimination and his misunderstanding regarding the potential use of his un-recorded statement. As evidenced by his statement, Petitioner Ochoa obviously believed that what he said would not be used against him if it was not tape recorded. The matter was never clarified by Detective Briamonte, to the contrary, the detective told Petitioner that the tape recorder was simply a tool to record his side of the story. Under these circumstances, the State simply could not meet its "great" burden of showing that Petitioner Ochoa

possessed a full awareness of the nature of the right being abandoned and the consequences of his decision to abandon it.

In *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828 (1987), no error was found in the admission of statements where the defendant indicated that he would not give a written statement unless his attorney was present, but that had no problem talking with police about the incident. The *Barrett* court rejected a similar argument to that raised herein, that the defendant's "distinction between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes" only because there was direct testimony from the defendant, at trial, that he fully understood the *Miranda* warnings, including the fact that anything he said would be used against him in court. *Id.*, 479 U.S. at 530, 107 S.Ct. at 832.

Justice Brennan, in his concurring opinion, specifically noted, however, that in the absence of the defendant's trial testimony indicating that he understood his rights there could be no finding of a valid waiver because the "statement to police--that [Defendant] would talk to them, but allow nothing in writing without counsel--created doubt about whether he actually understood that anything he *said* could be used against him." *Id.*, 479 U.S. at 532, 107 S.Ct. at 834. Justice Brennan concluded that the statement standing alone was not a knowing and intelligent

waiver of the right to silence because a defendant cannot "voluntarily, knowingly, or intelligently waive a right that he or she does not understand to exist." *Id.*, 479 U.S. at 533 n. 2, 107 S.Ct. at 834 n. 2.

In the case at hand, Petitioner Ochoa's statement indicating that he would not talk with the tape recorder on because he did not want what he said to be used against him went even beyond the statement involved in *Barrett* in that Petitioner specifically maintained that the reason he was choosing not to make a recorded statement was based upon his belief that an unrecorded statement would not be used against him. As Justice Brennan's opinion in *Barrett* makes clear, this statement, absent any clarification by the police, creates doubt about whether Petitioner actually understood that anything he said (even unrecorded statements) could be used against him. Accordingly, the statement "militates against finding a knowing or intelligent waiver of the right to silence." *Id.*, 479 U.S. at 533, 107 S.Ct. at 834.

II. The admission of Petitioner's statement indicating that he did not "want what he said to be used against him" was improper as it constituted evidence of Petitioner's invocation of his fifth amendment privilege against self-incrimination.

As previously indicated, after Petitioner Ochoa was arrested and read his *Miranda* warnings, he told Detective Briamonte that he would not talk with the tape recorder on and told him that "I don't want what I say to be used against me." (Pet. App. 24-25). Reference to this statement was made during the prosecutor's opening statement at trial when the jury was told that, after *Miranda* warnings were provided to him, Petitioner Ochoa agreed to talk to Detective Briamonte, but that he would only do it if it was off-tape (Pet. App. 41). Petitioner's invocation of his rights was also introduced during the state's case-in-chief when Detective Briamonte testified that Petitioner Ochoa's "first quote ... after his response to *Miranda* was I won't --I won't talk with that on. I don't want what I say to be used against me." (Pet. App. 45).

The fifth amendment guarantees that no person shall be "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Therefore, it is impermissible to penalize an individual for exercising his fifth amendment privilege when he is under police custodial interrogation. *Doyle v. Ohio,*

426 U.S. 610, 96 S.Ct. 2240 (1976)

In *Miranda v. Arizona, supra,* the court indicated that:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute *or claimed his privilege* in the face of accusation.

384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 1625 n. 37 (1966) (emphasis added).

In *Doyle v. Ohio, supra,* this Court held that the government's impeachment of the defendants' exculpatory testimony by asking them on cross-examination why they had not explained their conduct at the time of the arrest was fundamentally unfair and violated the Due Process Clause. The *Doyle* court based its finding on the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty:

> Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any

> person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle, supra, 426 U.S. at 618, 96 S.Ct. at 2245.

In *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634 (1986), this Court again considered the use of post-arrest, post-*Miranda* silence and held that use of such as evidence of sanity violated the Due Process Clause. The *Greenfield* court held that use of post-*Miranda* silence as affirmative proof at trial was just as impermissible as the use of such silence for impeachment purposes considered in *Doyle*:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the State gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights

> will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Wainwright v. Greenfield, 474 U.S. at 292, 106 S.Ct. at 639.

The *Greenfield* court also recognized that post-*Miranda* warnings "silence" is not limited to silence, but also to statements expressing the invocation of rights under *Miranda:* "[W]e point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.,* 474 U.S. at 295 n. 13, 106 S.Ct. at 640 n. 13.

Thus, *Doyle* violations occur not only in situations where the government introduces evidence of a defendant's post-*Miranda* silence, but also in situations where a defendant's statement or actions exhibiting an intent to exercise his *Miranda* rights are introduced as evidence. As recognized by the *Greenfield* court, "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." *Id.*, 474 U.S. at 295, 106 S.Ct. at 640.

For example, in *Fields v. Leapley*, 30 F.3d 986

(8th Cir. 1994), the state's use of the defendant's statement "I ain't saying nothing" to impeach the defendant constituted reversible error. In *Franklin v. Duncan*, 70 F.3d 75 (9th Cir. 1995), the prosecutor's comment on the defendant's silence and his pointing to a jail sign indicating that conversations might be monitored were held to violate his Fifth Amendment right against self-incrimination and required the granting of the defendant's petition for habeas corpus. In *United States v. Valencia,* 773 F.2d 1037 (9th Cir. 1985), and *United States v. Wycoff*, 545 F.2d 679 (9th Cir. 1977), references to the defendants' refusal to sign waiver forms after *Miranda* warnings were held to be impermissible.

In this case, Petitioner Ochoa's statement that he did not want what he said to be used against him was clearly an invocation of his fifth amendment privilege and, thus, should not have been admissible at trial because it created a negative inference of guilt. In *Doyle, supra,* the Court recognized that "Every post-arrest silence is insolubly ambiguous" and therefore is of "little probative force," yet it carries with it a "strong negative inference" that the defendant is guilty. 426 U.S. 610, 617, 96 S.Ct. 2240, 2244. As recognized in *State v. Downing*, 171 Ariz. 431, 434, 831 P.2d 430, 433 (App. 1992), "the potential implication flowing from a defendant's claim of silence is that he has something to conceal, and has not been open and forthright concerning his conduct."

This is precisely the implication resulting from

Petitioner Ochoa's statement that he did not want what he said to be used against him and this implication was even more prejudicial than Petitioner's silence alone would have been. Petitioner's statement invoking his fifth amendment privilege carried with it the implication Petitioner was involved in the shooting by exhibiting an apparent acknowledgment of culpability in that he feared that what he had to say could be used against him by police. In fact, the implication flowing from Petitioner's invocation of his fifth amendment privilege was far more prejudicial than his ultimate statement, in which Petitioner denied shooting Mr. Espinoza.

As indicated previously, the cornerstone of the *Doyle* prohibition against the use of post-Miranda invocations of rights is that it is unfair and misleading for police officers to inform a suspect of his rights under *Miranda* if there is no "assurance that [his] silence will carry no penalty." *Doyle,* 426 U.S. at 617-18, 96 S.Ct. at 2244-45. By the same token, it is unfair and misleading to advise a suspect that what he says will be used against him without the assurance that the claim of his privilege against self-incrimination itself will not carry any penalty. Although Petitioner Ochoa may not have been sophisticated enough to simply remain silent when advised of his rights, he did clearly convey his desire to invoke his privilege against self-incrimination by telling Detective Briamonte that he did not want what he said to be used against him. As *Miranda, Doyle,*

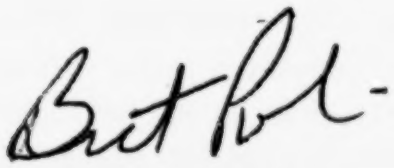
and subsequent cases make clear, evidentiary use of this statement is fundamentally unfair and violated Petitioner's right to Due Process of Law.

The admission of Petitioner's statement regarding the invocation of his fifth amendment privilege cannot be said to be harmless beyond a reasonable doubt. The evidence in this case boiled down to a pure credibility contest between the victim Espinoza and the defendant's witnesses. Evidence suggested that both sides had grudges against each other and, other than the Espinoza's identification, there was no direct evidence of Petitioner's involvement in the shooting. Thus, given the importance of Petitioner's credibility in this matter, the disputed evidence clearly was prejudicial enough to have affected the outcome of the proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment and order of the Arizona Court of Appeals, Division Two, because the admission of Petitioner's statement and invocation of rights at trial was constitutionally impermissible.

Respectfully submitted this 17th day of June, 2002.



BERTRAM POLIS
Attorney for Petitioner
338 N. Granada Avenue
Tucson, Arizona 85701
(520) 884-9911